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Environmental impact and habitats assessments

Abbotskerswell Parish Council v Secretary of State for Housing, Communities and Local Government
[2021] EWHC 555 (Admin)

The decision to grant outline permission -for a large development was challenged on several grounds. The court's observations discuss the nature of material considerations and various aspects of environmental impact and habitats assessments.

Background

Outline planning permission was granted for a large mixed-use development near Torquay, to include 1,200 houses, a school, care homes and employment, retail and community facilities. Only the location and access arrangements were specified, with all other matters to be dealt with later in accordance with a Masterplan to be approved by the planning authority. The grant of permission was challenged on grounds that centred on compliance with the requirements of Environmental Impact Assessment ('EIA') and assessment under the Habitats Regulations, relating to a Special Area of Conservation in relation to bats.

Material considerations

One interesting comment was made in passing by Lang J when noting that the decision on permission was to be taken in accordance with the development plan, unless material considerations indicated otherwise. In identifying the material considerations, she drew on earlier case-law to comment that there were three categories: those clearly (whether expressly or impliedly) identified by the statute as considerations to which regard must be had; those clearly identified by the statute as considerations to which regard must not be had; and thirdly those where the decision-maker had discretion. Considerations in this third category might be taken into account, but it was also open to the decision-maker to ignore them (unless deciding that they were immaterial would fail the *Wednesbury* irrationality test) or to decide to give them no weight. This provides a useful structure for analysis, but of course the crux of the matter will be placing any disputed matter into the right category.

Environmental Impact Assessment

In relation to the EIA procedure, it was agreed that climate change issues did fall to be considered as part of the process. It was held, though, that it had not been unreasonable to reject the objectors' claim that there was a need for further information on greenhouse gas emissions. The issue had not been ignored since various policies in the development plan that related to sustainable development had been considered. There were also sustainability benefits in developing the locally required housing in a location that reduced the need to travel, and significant emissions from the current agricultural use. Even if the issue had required further consideration, Lang J had no doubt that the same conclusion would have been reached, that the benefits of the development outweighed any disbenefits in emissions terms.

The decision was also challenged on the basis that the EIA process had not been properly carried out in that outline planning permission had been granted without full information on the impact on bats. As on the previous point, it was held that the issue had been addressed and a reasonable conclusion reached. It was not irrational to conclude that the detailed measures to avoid and mitigate any adverse impacts were most appropriately and effectively assessed in conjunction with the proposals for the detailed design and layout of the proposed development.

Habitats Assessment

The adequacy of the assessment under the Habitats Regulations was challenged since many details of the development were still uncertain. Lang J considered that if that approach were accepted it would in effect lead to a position where a grant of outline planning permission would never be possible. If all details of any matters which might affect the integrity of the site had to be assessed at the initial stage, this would effectively require an application for a full planning permission. Again, it was clear that the relevant issues had been addressed. It was held that the arrangements setting out clearly defined parameters for the approval of reserved matters enabled the Secretary of State to conclude, with sufficient certainty, that the proposed development would not adversely affect the integrity of the site.

Comments

Perhaps the main point about this decision is the reminder that the hurdle of establishing that planning decisions are unreasonable is a high one. Even where an EIA or habitats assessment is involved, the courts will leave wide scope for discretion and planning judgment. In the past, cases might have been referred to the Court of Justice of the EU ('CJEU') (directly or through complaints about the outcome made to the European Commission), where a more interventionist approach, based on securing the environmental objectives of those processes, might have been adopted. Those routes are, however, now closed.

The likelihood is that without the CJEU's supervision, the margin of discretion allowed to planning authorities and Ministers is not going to narrow. Moreover, it is interesting that within this judgment, although the precautionary approach required by the CJEU in habitats cases is mentioned in the background discussion, it does not feature at all in the judge's detailed consideration of the arguments over the assessment here; that would not be the case in Luxembourg. There is a risk that after Brexit, even though the legal framework may not change, the level of environmental protection will be eroded through the recognition of discretion which may not be exercised in favour of environmental goals behind that framework.

A second point is another reminder, that there are significant difficulties in fitting the process of granting outline planning permission into the EU-derived assessment procedures that are designed for a single-stage approval process. History in this area would suggest that without the CJEU's involvement, there will again be greater focus on ensuring simply that matters have been taken into account, rather than ensuring that the outcomes meet the protective aims of the legislation. This may allow outline planning permissions to be granted even though at that stage it is not clear whether and how the environmental protection requirements are to be satisfied.

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